88-1143

No. 88-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NATIONAL BANK AND TRUST CO. OF NORTH AMERICA, LTD.
(DOING BUSINESS IN NEW YORK AS NATCORP),
Petitioner,

v.

BANCO DE VIZCAYA, S.A.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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January 11, 1989

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QUESTION PRESENTED

Does a state court dismissal on the ground of *forum non conveniens* of an action brought by an assetless resident of that state deprive the plaintiff of due process of law where the courts of the proposed alternative jurisdiction are unavailable to the plaintiff because it lacks the financial resources to advance the substantial fees and costs required to commence the action in the proposed alternative jurisdiction?

LIST OF PARTIES

Petitioner, National Bank and Trust Co. of North America, Ltd., has no parent companies, subsidiaries, or affiliates.

As of August 18, 1988, Respondent, Banco de Vizcaya, S.A., reported that it has no parent company, but does have the following subsidiaries and affiliates:

Advent International Corp.
Banca Catalana, S.A.
Bancaya Hipotecaria, S.A.
Bancaya Inmobiliaria, S.A.
Banco Comercial de Mayaguez
Banco de Barcelona, S.A.
Banco de Credito Comercial, S.A.
Banco de Credito Y Ahorro, S.A.
Banco de Financiacion Industrial, S.A.
Banco de Credito Canario, S.A.
Banco Industrial de Catuluna, S.A.
Banco Industrial del Mediterraneo, S.A.
Banco Industrial del Sur, S.A.
Banco Meridional, S.A.
Banco Occidental, S.A.
Bancoco
Banquest First Nat'l Bank of Santa Fe
Banquest Nat'l Bank of Albuquerque
Banquest State Bank of Taos
Cedeban, S.A.
Cofiges
Cogebel
Spectra
Financiera Espanola de Inversiones, S.A.
Financiera Grain Via, S.A.
Gral. Financiera de Almacenes Generales de Deposito
Banque de Gestion Financiere, S.A.
Gescaya, S.A.
Gestion de Patrimonios Bancaya
Leasing Bancaya, S.A.

New Mexico Banquest Corp.
New Mexico Banquest Investors Corp.
Plus Ultra, C.A. de Seguros Generales
Sociedad Bancaya de Promocion Empresarial S.A.
Sociedad de Ventas a Credito
Vizcaya Finanz, A.G.
Vizcaya International, N.V.

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No. 88-

NATIONAL BANK AND TRUST CO. OF NORTH AMERICA, LTD. (DOING BUSINESS IN NEW YORK AS NATCORP),
Petitioner,

v.

BANCO DE VIZCAYA, S.A.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

Petitioner, National Bank and Trust Co. of North America, Ltd. (doing business in New York as NATCORP) (hereinafter, "National") respectfully asks this Court to issue a writ of certiorari. Review is necessary to prevent application of a decision of the highest court of the State of New York that is in conflict with decisions of this Court and that deprives National of its right to due process of law as guaranteed by the Fourteenth Amendment.

OPINIONS BELOW

The memorandum decision and opinion of the New York Court of Appeals is published at 72 N.Y.2d 1005 (1988), and is attached as Appendix A to this petition. The order of the New York Appellate Division, First Department, affirming the order of the New York Supreme Court for New York County, Special Term (here-

inafter, "Special Term") is published at 134 A.D.2d 971, 520 N.Y.S.2d 891 (1987) and is attached as Appendix B. The opinion of Special Term is as yet unpublished and is attached as Appendix C.

JURISDICTION

The order of the New York Court of Appeals was entered on October 13, 1988. The jurisdiction of this Court rests on 28 U.S.C. Sec. 1254(1), since this is an action in which the New York Court of Appeals has rendered a final judgment. This petition is filed within the 90 days allowed by 28 U.S.C. Sec. 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves New York CPLR 327, and the Fourteenth Amendment to the United States Constitution. The provisions thereof are set forth in Appendix D.

STATEMENT OF THE CASE

Petitioner, National, is a corporation organized under the laws of the British West Indies, and qualified to do business in New York. *R.A.* at 238; 357-58.[1] National has no assets other than this action. *R.A.* at 142; 238.

Since at least 1980, National's sole office (other than a British West Indies statutory mailing address) has been the New York residence of Agustin Arrau, the owner of 98 percent of National's outstanding stock, and its president, sole officer and sole employee. *R.A.* at 238. Arrau has lived in New York continuously from 1975 to the present. *R.A.* at 1481-82.

Respondent, Banco de Vizcaya, S.A. (hereinafter, "BdV"), is an international banking corporation chartered in Spain, which conducts business as a bank in

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[1] References to the Record on Appeal before the New York Court of Appeals shall be designated "*R.A.*" and followed by the appropriate page number.

New York. BdV has assets in excess of $15 billion and maintains assets exceeding $700 million in the United States, with at least $100 million in assets in the State of New York. *R.A.* at 239; 1072-76.

The dispute between the parties stems from BdV's admittedly illegal diversion from New York and subsequent misapplication of $5.3 million, some $2 million of which BdV had irrevocably committed to pay to National. *R.A.* at 267-82.

In 1975, Nigeria entered into numerous contracts to purchase a total of 16 million tons of cement, agreeing to pay the suppliers "demurrage," i.e., payment for the time the delivery ships lay idle in harbor waiting to be unloaded. One of these contracts was between the Nigeria and J.L.M. International, Inc., a Massachusetts corporation (hereinafter, "J.L.M."). *R.A.* at 359. National, as J.L.M.'s agent, contracted in New York to purchase the cement and chartered six ships to transport it. *R.A.* at 254.

In the summer and fall of 1975, hundreds of ships carrying cement, including the six chartered by National, reached Lagos harbor, overwhelming the port facilities. *R.A.* at 259. Demurrage costs escalated, and on September 30, 1975, Nigeria revoked its cement purchase contracts. *R.A.* at 250. National made substantial demurrage payments (approximately $2 million) to the owners of two of the six ships. These two ships were eventually unloaded in the summer of 1976. *R.A.* at 261-62. At the same time, BdV had guaranteed, and made, demurrage payments to the owners of two other of these six ships, on behalf of another party. *R.A.* at 260-61.

On March 11, 1976, in a settlement agreement with J.L.M. executed in Nigeria, Nigeria agreed to pay accrued demurrage on all six ships and to make periodic payments for demurrage accruing thereafter. *R.A.* at 365-66. That agreement required Nigeria to deposit

$5.3 million in a New York city bank account of BdV's London branch upon Nigeria's receipt of the time sheets held by each ship's master. *Id.*

National controlled the time sheets for the two ships for which it had paid demurrage and advised BdV that it would not authorize their release without a written commitment that, upon Nigeria's payment to BdV in New York, BdV would in turn pay National for past demurrage and make periodic re-payments of National's on-going demurrage payments. *R.A.* at 267-68. On March 31, 1976, BdV provided National with such an irrevocable commitment, which National accepted two days later. *R.A.* at 421-23; 430-31. Relying thereon, National released the time sheets.

BdV, however, without National's knowledge or consent, subsequently reneged on its March 31 commitment to National and agreed with Nigeria to change the place of payment, and diverted the $5.3 million to a West German bank account of its London branch.[2] BdV then refused to reimburse National for any part of the demurrage that National had paid. *R.A.* at 270-76.

National filed criminal charges against BdV in Spain, alleging that BdV had misappropriated $2 million. The Spanish criminal courts dismissed the charges for lack of subject matter jurisdiction, ruling that the acts of BdV complained of had occurred outside of Spain and did not violate the criminal laws of Spain. *R.A.* at 204-05; 217-18.

By this time, National was without assets and could not institute an action against BdV in the Spanish civil

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[2] In July of 1976, BdV discovered that J.L.M. was trying to change the place of payment agreed upon in the March 11 Settlement Agreement. BdV sent a cable to the Central Bank of Nigeria informing Nigeria that "[s]uch a request is illegal and if admitted legitimate interests will be left unsatisfied." *R.A.* at 440. Some two weeks later, BdV consented to change the place of payment to West Germany. *R.A.* at 444-45.

courts due to the high cost of retaining counsel. *R.A.* at 1515. Contingent fees are prohibited in civil actions in Spain. *Id.* Attorneys in Spain have no discretion over the fees they charge in civil actions, but instead are required by law "to charge clients *and collect* minimum recommended fees" based upon the amount of money involved in the litigation. *Id.* (emphasis added). Because of the amount in controversy, the cost to National to retain an attorney and to institute an action in the Spanish civil courts, even to test their court's jurisdiction, would, according to the uncontroverted opinion of National's expert on Spanish law, amount to "well over $200,000," excluding the potential costs for interpreters and experts on United States law. *Id.*

In March of 1982, National, whose sole office has since at least 1980 been in New York, instituted the underlying civil action in the New York Supreme Court. National was able to institute that action *only* because it was able to obtain legal counsel on a contingent fee basis. *R.A.* at 322-23.

The complaint stated causes of action for fraud, an accounting, willful breach of fiduciary duty and breach of contract. National sought $2,180,000 in compensatory damages, punitive damages, and an accounting and recovery of all profits earned by BdV with the principal owed to National. *R.A.* at 13-36.

In September of 1982, BdV moved pursuant to CPLR Sec. 327 to dismiss the action on the ground of *forum non conveniens.* Special Term dismissed the action, subject to BdV's stipulation that it would appear and waive any statute of limitations defense in Spain, the proposed alternative forum, that had not expired prior to the institution of the New York action. *R.A.* at 11.

Special Term dismissed the action despite the uncontradicted evidence that National was an assetless shell, with no hope of being able to proceed in Spain due to the

prohibitive cost of instituting a civil action there. *R.A.* at 321-23; 1515. Yet, in the face of this evidence, Special Term stated that there was "no reason to conclude that the Spanish courts would not entertain this civil suit. . . ." *App. C* at 9a.

Special Term's dismissal was without prejudice subject to National's right to reinstitute the action in New York in the event that the Spanish courts "reject jurisdiction." *App. C* at 10a. This caveat underscores Special Term's failure to consider the practical unavailability of the "alternative" Spanish forum, since National had demonstrated that it was without the financial resources to even institute an action and determine if the Spanish courts would accept jurisdiction. Accordingly, Special Term's order left National without any forum, and effectively denied it the ability to prosecute its action anywhere.

The Appellate Division affirmed without opinion. *App. B* at 3a-4a. The New York Court of Appeals granted leave to appeal, and then in a brief memorandum opinion affirmed the order of the Appellate Division. *App. A* at 1a-2a.[3]

The Court of Appeals avoided addressing National's argument that Spain was not an available forum. It characterzed the availability of an alternative forum as merely another factor to be considered by Special Term. Having minimized the determination that an available alternative forum exist, by characterizing it as one of many factors whose weight is wholly dependent upon the trial court's discretion, the Court of Appeals effectively sanctioned dismissal even where dismissal

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[3] In its briefs before the appellate courts, Petitioner re-articulated this argument that dismissal of the case in New York would have the practical effect of denying National access to *any* judicial forum. *National's Brief Before the Appellate Division* at 54-57; *National's Brief Before the Court of Appeals* at 55-59.

would constitute the death knell of the litigation. Incredibly, the New York Court of Appeals began and ended its review by concluding that, because Special Term had *considered* the argument offered by National that dismissal on the grounds of *forum non conveniens* would be the death knell of the action, it had not abused its discretion. *App. A* at 2a.

REASONS FOR GRANTING THE PETITION

I. As a matter of law, and of due process of law, a court may not dismiss an action on the ground of *forum non conveniens* without first ascertaining that an alternative forum exists both as a legal and as a practical matter.

In both *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947), and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254, Fn. 22 (1981), this Court wrote that any application of the doctrine of *forum non conveniens* presupposes the existence of an alternative forum. At least one federal court has suggested that this rule is "clearly grounded on due process considerations." *Farfanfarmaian v. Gulf Oil Corp.*, 437 F. Supp. 910, 915 (S.D.N.Y. 1977), *aff'd* 588 F.2d 880 (2d Cir. 1978).

This Court should grant the petition for writ of certiorari to establish that the availability of an alternative forum as a prerequisite to dismissal of an action on *forum non conveniens* grounds goes hand in hand with the concept of an "opportunity to be heard" that is a central tenet of due process. While the requirement of an available alternative forum has been generally adhered to by state and federal courts,[4] its failure to be understood

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[4] *See* Restatement (Second) Conflict of Laws, Sec. 84 (1969). "The majority of jurisdictions . . . are in accord with the Restatement view that an alternative forum is not merely *a factor* in analysis, but rather an *essential prerequisite* to application of *forum non conveniens*." *McLeod v. McLeod*, 338 A.2d 39, 43, Fn.3 (Me. 1978) (emphasis in original).

as a constitutional mandate has led to its misapplication as only a mere factor to be weighed.

In *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 467 N.E.2d 245, 478 N.Y.S.2d 597 (1984), *cert. denied*, 469 U.S. 1108 (1985), in determining whether as a matter of comity New York need make its courts available to a non-resident plaintiff suing a non-resident defendant over a dispute with no nexus to the state, the New York Court of Appeals held that the availability of an alternative forum is not a threshold requirement but is rather only a factor to be weighed in a *forum non conveniens* analysis. *Id.* at 481. There, the court ruled that this Court's statements that another forum be available as a necessary prerequisite to dismissal was "dicta" and that this Court "never suggested that the doctrine of *forum non conveniens* implicates constitutional due process rights." *Id.*

In the instant case, the New York Court of Appeals applied *Pahlavi* beyond its peculiar factual circumstances in determining that the availability of an alternative forum is merely a factor to be weighed in a *forum non conveniens* analysis in an action brought by a New York resident in a New York Court. In so doing, the court below failed to consider the due process implications of dismissal where the uncontested evidence was that the other forum was, as a practical matter, unavailable. As a result, Petitioner was deprived of its property (its causes of action) without due process of law.

To comport with due process considerations of fairness and justice, a forum must not just be theoretically available, it must also be within the grasp of the particular litigant before the court. If due process of law requires a hearing before a property right may be extinguished, then, in the context of *forum non conveniens*, due process of law also requires that before a case may be dismissed, a court must determine that an alternative forum exists and that the plaintiff will be able to obtain a hearing in

that forum. Otherwise, legitimate causes of action can be consigned to a purgatory in which no forum will provide the plaintiff with an opportunity to be heard.

The United States Constitution does not permit this. The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend XIV, sec. 1. National's causes of action against BdV are a species of protected property. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Martinez v. California*, 444 U.S. 277, 281-82 (1980). "[I]t has become a truism that '*some* form of hearing' is required before the owner is finally deprived of a protected property interest." *Id.* at 433 (*quoting Board of Regents v. Roth*, 408 U.S. 564, 570-71, Fn. 8 (1972) (emphasis in original)); *see also Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958); *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 350-51 (1909). Indeed, this Court has left no doubt that "[t]he fundamental requisite of due process of law is the opportunity to be heard," *Grannis v. Ordean*, 234 U.S. 385, 394 (1914), and that a plaintiff's access to a court for resolution of his legal claim is deserving of due process protections to the same extent as is a defendant's. *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971).

Thus, National's causes of action is a protected property interest and it follows that the due process clause prohibits a state court from dismissing them without insuring that there is an "opportunity to be heard."[5]

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[5] To be sure, certain limits and reasonable procedural requirements, such as statutes of limitations or reasonable filing fees, may be placed on a litigant's right to have its case determined on its merits. *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314-16 (1945); *United States v. Kras*, 409 U.S. 434 (1973). A court may dismiss a case, without considering the merits of the underlying cause of action, if a party fails to comply with such procedural

In the instant case, the proposed alterantive forum does not offer an adequate opportunity because it imposes insurmountable financial hurdles before a party with no ability to pay the "entry fee." [6] It is different from *Gulf*, where the Court was "quite sure" that there was an "open door" somewhere. *Gulf, supra*, 330 U.S. at 507. It is different from *Piper*, where there were two "open doors," albeit where one offered a "process" less palatable to the plaintiff. *Piper, supra*, 454 U.S. at 247. In the instant case, there is only one open door, New York—the other is closed to all who cannot afford the substantial admission fee.

In *Piper*, the representative of the estates of several Scottish citizens killed in a plane crash in Scotland, was told to take the citizens' claims to the Scottish courts, where they would no doubt be heard, although not necessarily to the representative's satisfaction. *Id.* at 260-61. In the instant case, the courts below have told Petitioner, a New York resident, to take its claim elsewhere, without regard for the fact that *there is no elsewhere.*

Thus, review by this Court will prevent the perversion of the "balancing" process which this Court endorsed in

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or evidentiary rules. *Hammond Packing Co. v. Arkansas, supra,* 212 U.S. at 351.

But in the case of *forum non conveniens,* the court's analysis presupposes that the plaintiff has *complied* with all applicable jurisdictional and venue statutes, and a *forum non conveniens* dismissal is not premised on a plaintiff's failure to comply with procedural requirements. *Gulf Oil Corp. v. Gilbert, supra,* 330 U.S. at 507.

[6] The financial barrier facing National is far more substantial than the $50 filing fee upheld in *Kras.* The Court stressed the minimal burden placed on the plaintiff in *Kras,* equating his $1.28 per month (in 1973 dollars) required to proceed in bankruptcy court with the cost of a movie or two packs of cigarettes. *Kras, supra,* 409 U.S. at 449. National, on the other hand, has demonstrated that it will be forced to front approximately $200,000 in order to proceed in the Spanish civil system. *R.A.* at 321-23; 1515.

Gulf and *Piper* from a shield into a sword by which a defendant who makes a successful *forum non conveniens* motion can do much more than "vex," "harass," or "oppress" his opponent; he can literally send his opponent's case into oblivion. Review by this Court can prevent this, by demonstrating that the threshold requirement that there be, in a *real* sense, an alternative forum—before any such balance can be done—is a mandate of the Constitution.

The New York Court of Appeals, in affirming the dismissal of Petitioner's action without requiring a determination that an alternative forum is "available" to the plaintiff, has transformed the originally benign concept of *forum non conveniens* into a different, and dangerous, legal principle, one that fails to conform to traditional notions of due process of law. Review by this Court is necessary to demonstrate that the due process clause precludes the New York version of *forum non conveniens* as a procedure which may be invoked simply to crush the life out of viable causes of action, a protected property right, by shutting the doors of the only forum practically available to the plaintiff.

In the instant case, Special Term's finding that "there is no reason to conclude that the Spanish courts would not entertain this civil suit and that the ultimate relief sought—damages arising from the contract repudiation—are not available in Spain" (*App. C* at 9a), is little more than a finding that the Spanish civil justice system exists and, *in theory*, was available to the plaintiff. But theory and reality are often polar opposites. Thus by reviewing this case, the Court can provide the state and lower federal courts with a definitive description of what constitutes an "available" alternative forum in the context of a *forum non conveniens* determination.

In the instant case, the courts of Spain are simply unavailable to Petitioner in either a practical or a theoretical sense. Petitioner demonstrated to Special Term

that a Spanish forum was not available in any theoretical sense. The Spanish criminal courts had determined that they had no jurisdiction of the dispute, and that the acts complained of occurred outside of Spain, and did not violate Spanish criminal law. *R.A.* at 204-05; 217-18. And National demonstration to Special Term that Spanish civil law does not allow for the recovery of profits improperly earned as a result of a breach of fiduciary duty was undisputed by BdV. *R.A.* at 188-89; 193-94; 1510-15; 1519-21. Thus, Spanish courts could not even in theory provide relief for this claim.

But, in addition to the theoretical unavailability of the Spanish court, National cannot, as a practical matter, gain access thereto. In this case, National has demonstrated that it is unable to institute, no less prosecute, a civil action in Spain. National, to simply obtain its "day in court"—even to contest the court's subject matter jurisdiction—would have to advance $200,000 that it does not have. *R.A.* at 1515. For National, this "entry fee" represents more than expensive justice, it represents an insurmountable bar to justice.

The courts below failed even to address this reality. Instead, the Court of Appeals affirmed the lower court's decision on the incredible basis that because Special Term had "considered" the argument that National was asset-less then it could not be deemed to have abused its discretion in dismissing the case. The Court of Appeals found no "abuse of discretion," despite the inevitable conclusion that dismissal in New York Supreme Court sounded the death knell of the litigation and prevented National from retrieving its stolen property through ANY court system. But the question is more than whether there was an abuse of discretion. Review by this Court is essential to demonstrate that the right to a hearing before a property right can be eliminated is a matter of constitutional right, not a question of appropriate weight in a balancing process.

This Court should grant the petition and inject a strong dose of reality into the runaway doctrine of *forum non conveniens*. When evaluating claims that certain procedures violate due process, this Court has taken the proper approach and has looked to the practical realities of each case. Thus, in *Mullane v. Central Hanover*, *supra*, 339 U.S. at 315, in addressing the analogous issue of what notice satisfies due process, this Court rejected the argument that notice that *in theory* could reach the defendant (i.e. notice by publication) was comparable to actual notice, such as a letter to the defendant's last known address, that *in practice* was reasonably expected to reach the defendant. Thus, "when notice is a person's due, process which is a mere gesture is not due process." *Id.*

Likewise, when an opportunity for a hearing is a person's due, the "availability" of a forum whose use is, practically, unavailable to the plaintiff is also a "mere gesture" that is not, and cannot be, due process. Just as notice must be "reasonably calculated" to reach the defedant to an action, so too must the opportunity to be heard in some court, somewhere in the world, be "reasonably calculated" to lead to a determination of the case on its merits. Any time that a court dismisses an action without first determining that there is an alternative forum available to a particular plaintiff, both in theory *and in practice*, that court is betraying concepts of fairness and justice inherent in the due process clause.

Several federal courts have grasped what the New York courts have not—the importance of an inquiry into the *practical availability* of an alternative forum. For example, the United States Court of Appeals for the Second Circuit in *Manu Int'l S.A. v. Avon Products, Inc.*, 641 F.2d 62 (2d Cir. 1981) reversed the district court's dismissal for *forum non conveniens*. The lower court's action would have required the plaintiff to litigate in Taiwan. One element of the court's reasoning was that

"the supposedly more convenient forum is in reality no forum at all." *Id.* at 67. The court noted that is would be "almost a perversion of the *forum non conveniens* doctrine" to send the plaintiff to a jurisdiction that did not offer realistic hope of providing a forum. *Id.* In *Irish Nat'l Ins. Co., Ltd. v. Aer Lingus Teoranta*, 739 F.2d 90, 91 (2d Cir. 1984), another panel of the United States Court of Appeals for the Second Circuit described any *forum non conveniens* analysis undertaken without a threshold inquiry into the *practical availability* of the alternative forum to be "Kafkaesque" and "somewhat of a legal charade." *Id.* at 91.

Petitioner does not argue that the lack of a contingent legal fee system in Spain should constitute a *per se* bar to dismissal on the ground of *forum non conveniens.* This would ignore the fact that many plaintiffs can well afford to litigate overseas. But, on the undisputed facts of this case, there is no doubt that the financial barriers raised by Spain to civil litigation constitute an impentetrable barrier to National's ability to even institute an action, much less to obtain a hearing in that forum. The Fourteenth Amendment required Special Term to determine National's practical ability to gain access to the Spanish forum. The due process clause requires that the availability of an alternative forum be affirmatively established as a matter of law and not merely treated as another "factor" in a complex balancing test left entirely to the discretion of the trial court.

CONCLUSION

This Court should issue a writ of certiorari and review the decision of the New York Court of Appeals. The Court should make clear that a *forum non conveniens* dismissal of an action despite a showing that the Petitioner cannot afford the proposed alternative forum deprives Petitioner of its "opportunity to be heard" and violates its right to due process of law as guaranteed by the Fourteenth Amendment.

Respectfully submitted,

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January 11, 1989

APPENDICES

APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

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1 No. 233

NATIONAL BANK AND TRUST CO. OF NORTH AMERICA, LTD. &C.,
Appellant,

v.

BANCO DE VIZCAYA, S.A.,
Respondent.

Michael J. Hutter, Albany, & David H. Fromm & Jerrold T. Doros, NY City, for appellant.

Eliot Lauer, NY City, for respondent.

MEMORANDUM:

The order of the Appellate Division should be affirmed, with costs.

The doctrine of forum non conveniens permits a court to dismiss an action when, although it may have jurisdiction over a claim, the court determines that "in the interest of substantial justice the action should be heard in another forum" (CPLR 327). The doctrine is flexible, requiring the balancing of many factors in light of the facts and circumstances of the particular case (*Banco Ambrosiano, S.p.A. v Artoc Bank & Trust*, 62 NY2d 65, 73; *Silver v Great Amer. Ins. Co.*, 29 NY2d 356, 361). This task is committed to the sound discretion of the courts below and, unless they have excluded consideration of relevant circumstances, there has been no abuse of

discretion reviewable by this Court (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479; *Varkonyi v Varig*, 22 NY2d 333, 337-38).

On this record, the failure of Special Term to explicitly address the issue in its written decision does not establish that the courts below refused to consider the factors relating to the availability of an alternative forum. Nor does it appear that the lower courts neglected any of the other considerations proffered by plaintiff or otherwise committed legal error.

Accordingly, there is no basis for us to disturb their decision to dismiss the action.

Order affirmed, with costs, in a memorandum. Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Titone, Hancock and Bellacosa concur.

Decided October 13, 1988

APPENDIX B

ORDER OF APPELLATE DIVISION DATED NOVEMBER 19, 1987 AFFIRMING ORDER OF SPECIAL TERM

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 19, 1987

Present—Hon. Francis T. Murphy, Presiding Justice
Leonard H. Sandler
Sidney H. Asch
E. Leo Milonas
Ernst H. Rosenberger, Justices.

31255

NATIONAL BANK AND TRUST CO. OF NORTH AMERICA, LTD.
(doing business in New York as NATCORP.),
Plaintiff-Appellant,

-against-

BANCO DE VIZCAYA, S.A.,
Defendant-Respondent.

An appeal having been taken to this Court by the plaintiff-appellant from an order of the Supreme Court, New York County (Harold Baer Jr., J.), entered on September 19, 1986, and said appeal having been argued

by Mr. Jerrold T. Doros, David H. Fromm and Frederick A. Polatsek of counsel for the appellant, and by Mr. Eliot Lauer and Benard v. Preziosi, Jr. of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed. Respondent shall recover of appellant $75 costs and disbursements of this appeal.

ENTER:

/s/ [Illegible]
Clerk

APPENDIX C

SUPREME COURT
NEW YORK COUNTY SPECIAL TERM
PART I

Index No. 7092/82

NATIONAL BANK AND TRUST CO. OF NORTH AMERICA, LTD.,
Plaintiff,

-against-

BANCO DE VIZCAYA, S.A.,
Defendant.

[Filed Sept. 17, 1986]

HAROLD BAER, JR.:

Defendant, Banco De Viscaya, S.A. ("BdV") renews its motion pursuant to CPLR 327 to dismiss this action on the ground of *forum non conveniens.* Briefly, this case arises out of an agreement to supply cement entered into in 1975 between the Republic of Nigeria with J.L.M. International, Inc. ("JLM"), a Massachusetts corporation. JLM subsequently, through plaintiff National Bank and Trust Co. of North America, Ltd. ("National"), contracted with Interexporte, S.A.R.L. ("Interexporte"), a Portuguese company, pursuant to which Interexporte agreed to furnish and ship the cement to Nigeria.

In May, 1975, Interexporte contracted with two Spanish corporations, Fletamentos Macia, S.A. and its affiliate, Juan Macia, S.A. (collectively, "Macia"), pursuant to which Macia would furnish the necessary vessels to transport the cement from Portugal to Nigeria.

BdV, on behalf of Macia, issued guarantees of the demurrage payable to two Greek-flag vessels which had been chartered by Macia and National to transport cement to Nigeria. Several other vessels were chartered, but BdV was not requested to issue guarantees covering those vessels. The vessels, loaded with cement, arrived in Lagos Harbor between July and October, 1975, and due to delays in unloading the vessels, were forced to anchor in the harbor and incur demurrage. BdV made demurrage payments under its guarantee covering the two Greek-flag vessels and National made payments for at least two others—the Agelos Gabriel and the Salvia.

In March, 1976, a settlement was reached in Nigeria between Nigeria and JLM whereby Nigeria undertook subject to the presentation of satisfactory documents to pay all the accrued demurrage through March 10, 1976, and JLM agreed to cancel the balance of the contract for cement. Demurrage payments were to be made to the account of BdV London, at the Mellon International Bank in New York City with reference to JLM.

Since National had paid the demurrage on the Agelos Gabriel and Salvia, the necessary documents in order to obtain reimbursement were held by National, who refused to authorize their release until National's bank, BIC, received from Macia's bank, BdV, a written commitment that upon Nigeria's payment of the demurrage to BdV, BdV would pay to National 87.5% of all demurrage paid by National to the owners of the Agelos Gabriel and Salvia through March 10, 1976, ($1.04 million). Accordingly, on March 31, 1976, a letter (the "Letter") was sent to BIC in Madrid from BdV in Madrid which provided that BdV agreed to pay over monies received from Nigeria in return for National's seeing to it that before April 9, 1976, the shipowners filed the necessary documents with Macia to obtain payment of demurrage from Nigeria.

National urges that the Letter was intended to cover past as well as any future demurrage payments and that it notified its shipowners immediately to transfer the appropriate documentation to Macia for presentation to Nigeria. On April 2, 1976, National alleges that by letter sent from Kingstown, St. Vincent, West Indies, (National's place of incorporation), the terms were acknowledged. By letter dated May 14, 1976, Macia, writing from Madrid to BdV also in Madrid, advised BdV that since BIC had not accepted the March 31 offer, BdV was instructed to cancel the deal set out in the Letter.

On August 30, 1976, and again on September 21, 1976, Morgan Guaranty, Nigeria's bank in New York City, received instructions from Nigeria's Central Bank to make a total payment of approximately $5.3 million to Deutsche Bank in Frankfurt for the account of BdV in favor of JLM for demurrage claims. Nigeria, JLM and BdV had earlier agreed to change the bank to which the payment was to be made from Mellon in New York to the German bank. BdV distributed the proceeds to a variety of concerns, but nothing was paid to National.

National, in October, 1979, commenced criminal proceedings against BdV in Spain but was twice thwarted, once because the Spanish court, without elaboration, concluded that criminal conduct, if any, arising out of these transactions occurred in London. Thereafter, a criminal court—with jurisdiction over acts outside Spain—decided that the matter was civil, not criminal and dismissed the criminal proceeding in that court in 1981.

National commenced the instant action in May, 1982, for fraud, breach of contract, breach of "quasi-fiduciary" duty and for an accounting of profits earned by BdV with funds that National claims were improperly withheld from them.

BdV's initial motion pursuant to CPLR 327 was, in effect, held in abeyance pending discovery into the ap-

propriateness of a motion to dismiss on the ground of *forum non conveniens*. That discovery has now been completed and the issue is ripe for consideration.

CPLR 327 allows a court to stay or dismiss an action where it is determined that the action, although jurisdictionally proper, would be better adjudicated elsewhere. *Islamic Republic v. Pahlavi*, 62 NY2d 474, 478 NYS2d 597 (1984). The burden rests, the Court of Appeals said in *Pahlavi*, "upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation . . . and the court, after considering and balancing the various factors, must determine in the exercise of its sound discretion whether to retain jurisdiction or not." 62 NY2d at 479.

Among the factors to be considered are the potential hardship to the defendant, the unavailability of an alternative forum in which plaintiff may bring suit, the burden on the New York courts and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction. No one factor is controlling.

In the instant case, the transaction out of which the causes of action arose occurred outside New York. The March 31, 1976 Letter was sent from Spain to BIC's Madrid offices. The April 2, 1976, "acknowledgment" by National originated in St. Vincent. The alleged repudiation of the agreement occurred, if at all, in Madrid when Macia wrote from its offices there to those of BdV in Madrid, cancelling the agreement. Even assuming arguendo that National was to be paid in New York—a fact for which there is no support other than that payment by the terms of the letter was to be made to National in US dollars—the center of gravity for these transactions was Spain and a New York court would be obligated to apply Spanish law which would govern those claims based on acts and representations which took place

in Spain and involved transactions between the Spanish offices of two banks. *See Babcock v. Jackson*, 12 NY2d 473, 240 NYS2d 743 (1963). While not an insurmountable burden for the court, deciphering the applicable Spanish law has hardly been an easy task for these litigants.

Turning to the hardship on the defendant, both parties have made it clear that wherever the trial is held some witnesses and parties will be inconvenienced. Non-party witnesses—BIC, Macia and officials of the Nigerian Government—are located outside New York and, significantly, BdV asserts that if the action was tried in Spain it would join Macia because the bank was acting solely on his instructions. There is no proof that Macia could be impled into the instant action.

While commencing the action in New York serves the convenience of National because its majority shareholder resides in New York, generally a plaintiff must be able to show more than its own convenience for selecting a forum where the choice imposes a heavy burden on the court and the defendant. *Pahlavi, supra* at 482. Moreover, courts have dismissed cases where the plaintiff is a New York Corporation or, like National, is qualified to do business here, where the underlying facts have no nexus with this state. *Meritum Corp. v. Lawyers Title Ins. Corp.*, 88 AD2d 828, 451 NYS2d 134 (1st Dept.) *aff'd, Adriana Dev. Corp. v. Gasper*, 81 AD2d 235, 439 NYS2d 927 (1st Dept. 1981). Concommitantly, the BdV branch office in New York, while maintaining sufficient contacts here to sustain jurisdiction, played no role in the transactions out of which the instant action arose.

Finally, as to the availability of an alternative forum in which plaintiff may sue, there is no reason to conclude that the Spanish courts would not entertain this civil suit and that the ultimate relief sought—damages arising from the contract repudiation—are not obtainable in Spain.

Should the Spanish courts reject civil jurisdiction over this matter, the parties may apply to the New York court for appropriate relief. *See Adriana Dev. Corp. v. Gaspar supra.*

Therefore, the motion to dismiss the action on the ground of *forum non conveniens* (CPLR 327) is granted on condition that within 60 days from the date of this order, defendant shall serve and file a stipulation agreeing that if within one year after the date hereof plaintiff institutes an action in the Spanish courts for a determination of the claims asserted in the instant action, the defendant will appear and submit to the jurisdiction of the Spanish courts in that action and shall stipulate to waive any statute of limitations defense in that action to the extent that the applicable statute of limitations had not yet expired prior to the institution of the instant action. In the event such stipulation is not so furnished, the motion to dismiss shall be denied, provided further that such dismissal shall be without prejudice to the prompt reinstitution of the action in New York in the event that the Spanish courts reject jurisdiction.

This constitutes the decision and order of the court.

Dated: September 12, 1986

/s/ J.S.C.
J.S.C.

APPENDIX D

STATUTES INVOLVED

New York Civil Practice Law and Rules
Rule 327. Inconvenient forum

(a) When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.

Constitution of the United States
Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.